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TEACHING THE POST-SEX GENERATION

KERRI LYNN STONE*

INTRODUCTION

There is a trend that I have observed in the course of leading my classes in discussions about the kinds of behavior that may constitute unlawful discrimination: the emergence of an attitude among students that society is simply “post-sex,” or no longer in need of most or all anti-sex discrimination jurisprudence.¹ Below, I detail my own approach to teaching and to raising and

* Associate Professor, Florida International University College of Law. J.D., New York University School of Law; B.A., Columbia College, Columbia University. I would also like to thank my research assistants, Stephanie Harris, Ben Hefflinger, and Ingrid Cepero for all of their able assistance, as well as my husband Josh Stone and my son Dylan Stone for making the experience of writing this piece possible and fun.

1. See Angela Onwuachi-Willig, *Teaching Employment Discrimination*, 54 ST. LOUIS U. L.J. 755, 756–57 (2010) (“Unlike many of their predecessors, this generation’s law students, . . . believe that we are past race. They have learned about racism as an evil that occurs only when perpetrators with bad intent target their hatred against people of differing races, instead of as a systemic force that is both attitudinal and institutional Similarly, they have grown up believing that women have equal access to promising opportunities within the workplace. When the female law students of this cohort think about ‘opting out’ of work outside the home, many of them truly believe that the choice will be theirs. Additionally, they look around their law school classrooms, seeing half of the room filled with women, and are affirmed in their belief of true gender equality.”); Kerri L. Stone, *Decoding Civility*, 28 BERKELEY J. GENDER L. & JUST. 185, 216–217 (2013) (posing the question as to why so many people believe that society is post-gender but the status gap still remains); Kerri L. Stone, *Are We “Post-Gender?”*, PRAWFSBLAWG (Feb. 28, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/02/are-we-post-gender.html>. But cf. HART & MCINTURFF, *Study #13127: NBC News/Wall Street Journal Survey*, MSNBC, 17, http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/13127%20APRIL%20NBC-WSJ%20Filled-in_1.pdf (last visited Aug. 23, 2013) (reporting that 46% of women in a survey stated that they had personally experienced discrimination because they are women); *Revisiting the Mommy Wars*, PEW SOCIAL TRENDS (Sept. 15, 2008), <http://www.pewsocialtrends.org/2008/09/15/revisiting-the-mommy-wars/> (“A notably higher share of mothers (61%) than fathers (44%) of children under 18 say that discrimination against women is a serious problem.”); *Three in Five Americans Say U.S. Has Long Way to Go to Reach Gender Equality*, HARRIS INTERACTIVE (Aug. 16, 2010), <http://multivu.prnewswire.com/mnr/harrisinteractive/44727/> (“Even more Americans (63%) agree that the U.S. still has a long way to go to reach complete gender quality [sic]. While three-quarters of women (74%) agree with this, so do just over half of men (52%).”); Deborah Jordan Brooks, *Job Equality Views: Gender Gap Still Wide*, GALLUP (Aug. 27, 2002), <http://www.gallup.com/poll/6688/Job-Equality-Views-Gender-Gap-Still-Wide.aspx> (“Thirty-four percent of men

conducting discussions about how anti-discrimination legislation and jurisprudence works in theory, in practice, and how it would/could work in an ideal world. I enjoy teaching students with a diversity of viewpoints. However, when I began to encounter a uniformity of views about the lack of a need for the protection of employees from sex discrimination, I found it necessary to revisit and think through my goals in and approach to these discussions, if for no other reason than the fact that students should be able to see both sides of issues, especially when the side with which they disagree reflects the current state of the law.

At the Florida International University College of Law, I teach Employment Law, Employment Discrimination Law, and Labor Law, as well as a seminar about Title VII. These are classes in which students must engage regularly with issues like whether lewd behavior in a given factual scenario rises to the level of sexual harassment, when the law should step in and acknowledge that someone was treated in a certain way “because of” his or her sex, race, or other protected class membership when it is not obvious, and how to weigh the factors that dictate the result of a judicially created test, from the extent to which speech is protected in a public workplace, to whether someone is an employee versus an independent contractor.

I. “UP THE MIDDLE”

My goals and philosophy for teaching these classes is relatively simple—I aim to teach, as I explain to my students, “right up the middle.” This conceptual “middle” refers to the courtroom aisle, the political spectrum, and anything else that spans or bifurcates the range of legitimate positions and standpoints that may be assumed in the successful practice of labor and employment law. Each member of the class ought to feel as prepared as possible to enter practice, having read, analyzed, and discussed the case law, legislation, and developments in the law, irrespective of whether they dream of working for plaintiffs or defendants, in public or private practice. My students understand from the outset that I will neither teach them nor test them on my personal politics or opinions. Rather, I aim to give them a comprehensive base of knowledge and skill to attain mastery of and facility with the law, with an emphasis on how *each* side of each case or debate will craft arguments, develop strategy, and marshal evidence. After all, the best thing that an aspiring plaintiff’s attorney can know going into a case is the defendant’s best strategy and arguments, and vice versa. Further, they learn quickly that they will study the law on several levels. On one hand, they will become well-

are very satisfied with the way women are treated in society, compared to only 18% of women. A similar gap exists when it comes to opinion on equality in the workplace. A majority of men (54%) feel that women have equal job opportunities with men, as do only 39% of women.”).

versed in the policy, contextual, historical, and theoretical underpinnings of the case law, legislation, and other sources of law and debate that we study. On the other hand, they will also learn the black letter law of the workplace as it currently exists. Finally, because they should be as practice ready as possible, each class will survey not only the topics on the syllabus as the casebooks present them, with relevant case law (usually appellate), legislation, and discussion, but the “real life strategies” for handling (or even preventing) these kinds of cases at, or even before, their inception. So, for example, my class will review not only the holding in a case in which an unlawful termination was alleged, but the process that went on under the auspices of the defendant prior to the termination: the handling of allegations, the conducting of investigations, and the affording of whatever “process” has been promised by law or policy. When we read the cases about disparate impact or systemic disparate treatment and statistics, we discuss which experts a good employment lawyer should have in her rolodex, how and when to employ them, and how they and their charts, number crunching, and testimony can help to educate a judge about everything from testing to statistical impact to industrial organizational psychology. When I call on students to recount facts of cases and identify issues, we often simulate a situation in which a busy partner needs to be briefed, thereby creating a need for students to parse their words carefully, articulate what they want to communicate precisely and in their own words, and, of course, to truly digest and understand what they are reading.

All in all, the goal of my classes and the premise of my approach is that I want to produce informed, practice ready attorneys who not only know the law, but who have the skills to practice it—on either side of the aisle. It is thus really important that they become capable of at least understanding both sides of an issue, even if they don’t agree with one side of it. After all, as I tell my students, the law of employment discrimination is so fascinating, in part, because it is both so new and so slow and so wildly unpredictable in its evolution. I continually remind my students to think about how long it can take for the law to resolve what sounds like it should have been a rudimentary issue in this area of law. For example, when my employment discrimination class covers age discrimination, we note that the legislative centerpiece of this area of law, the Age Discrimination in Employment Act, or ADEA, was passed in 1967.² The two major causes of action used in almost all employment discrimination cases, disparate treatment,³ and disparate impact,⁴ each had

2. 29 U.S.C. §§ 621–634 (2006).

3. See *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977) (“Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.”); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (en

workable frameworks that had been propounded by the U.S. Supreme Court and were being used by lower courts by 1973.⁵ The notion of a so-called “mixed motive” claim/jury instruction, set forth by the Supreme Court in the Title VII context in 1989,⁶ and enshrined in that statute two years later,⁷ also started being used by lower courts in contexts outside of Title VII, like age discrimination cases, immediately thereafter.⁸ However, it is interesting to note the years in which the Supreme Court finally furnished definitive answers to what appeared to be the most basic of questions: Are disparate impact claims available under the ADEA? (Yes, decided in 2005).⁹ Is a mixed motive jury instruction ever appropriate in an ADEA disparate treatment claim? (No, decided in 2009).¹⁰

The area of Title VII litigation is no different. Although, as discussed, disparate impact and disparate treatment claims have been mainstays of employment discrimination litigation since the early 1970’s, it was not until 2009 that the Supreme Court addressed the issue of their interplay and specifically, when an entity may lawfully engage in disparate treatment to stave off a claim of disparate impact (when it has a substantial basis in evidence to substantiate its fear that the disparate impact claim is colorable).¹¹ It is truly the case that the employment law and employment discrimination students of today will be engaged with essential issues and the fundamental developments in the law of tomorrow. This is important to communicate to students, both to stoke their enthusiasm for the study and practice of this specialty, but also to explain to them why more theoretical policy-based

banc) (citing 42 U.S.C. § 2000e-2(a)(1)) (“In disparate treatment, an employer discriminates against a worker ‘with respect to his compensation, terms, conditions, or privileges of employment, because of’ the individual’s membership in a protected category.”).

4. See *Teamsters*, 431 U.S. at 335 n.15 (1977) (“[D]isparate impact . . . involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988) (“[D]isparate impact [is] . . . a facially neutral practice, adopted without discriminatory intent, [which] may have effects that are indistinguishable from intentionally discriminatory practices.”).

5. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing the burden-shifting framework for disparate treatment cases); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (establishing a disparate impact framework).

6. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

7. 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

8. See, e.g., *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 316 (5th Cir. 2004) (holding that the mixed-motives analysis is applicable in ADEA cases); *EEOC v. Waterfield-Rohr Casket Co.*, 364 F.3d 160, 164 (4th Cir. 2004) (holding that an ADEA claim may be established through the “mixed-motive” framework); *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 362 (8th Cir. 2008) (holding that the mixed-motive instruction governs in an ADEA case).

9. *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

10. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 169–70 (2009).

11. See *Ricci v. DeStefano*, 557 U.S. 557, 592 (2009).

discussions, that go beyond what the current state of the law is, to why and how the law got to the state that it is in and ideas about what, proscriptively, makes the most sense for its future and evolution.

Similarly, it is also important when teaching in this area of the law to explain how policy debates and struggles among judges, and even between the Supreme Court and Congress can cause sharp veers and repeated vacillation in the law. For all my students know, their in-class theorizing about the wisdom of a legal doctrine could be the experience they draw from when they ask a court to abandon or modify it in practice not long from now. And yet my students do not need to learn my or anyone else's opinion on anything; they need to form their own opinions and to open their minds to understand others', especially when it comes to the kind of boundary pushing and new frontiers that courts will foreseeably find themselves grappling with in the near future.

II. THE PERIPHERY OF TITLE VII

I found myself, then, challenged to at least open the minds of some of my students when it came to teaching what I refer to as the "periphery of Title VII." Title VII of the Civil Rights Act of 1964, the centerpiece of employment discrimination litigation, prohibits discriminatory treatment against individuals with respect to the terms and conditions of their employment when that treatment is "because of" protected class membership.¹² Squarely within this prohibition are acts like firing or demoting someone where it can be shown via a clear demonstration (like a "smoking gun" admission)¹³ or even via a logical deduction (like a scenario in which context and circumstances versus more direct evidence make it apparent) that protected class membership was the reason for the decision. Similarly, in sexual harassment cases, the harassment must, among other things, be "because of" the victim's sex, whether that means that she was propositioned repeatedly or faced with a barrage of disparaging comments that reference her sex.¹⁴ In disparate impact cases,

12. 42 U.S.C. § 2000e-2(a)(1) (2006).

13. See, e.g., *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 510, 514 (3rd Cir. 2004) (holding that statement by owner's vice president to manager's coworkers, that vice president wanted to fire manager and replace her with a "young chippie," constituted direct evidence of discrimination); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 336, 340 (3rd Cir. 2002) (finding that decision maker's statement that he was "looking for younger single people" and that as a consequence, Fakete "wouldn't be happy [at Aetna] in the future" as direct evidence of age discrimination); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) (finding that decision maker's remarks to employee at the time of the firing that "she would be happier at home with her children" provided direct evidence of discrimination).

14. See, e.g., 29 C.F.R. § 1604.11(a) (2012) ("Harassment on the basis of sex is a violation of section 703 of title VII."); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates on the basis of sex.'"); *Henson v. City of*

facially neutral policies and practices that confer a disparate or disproportionate impact on a protected class of individuals, are called into question, and will be actionable unless the employer can show that they are business necessities.¹⁵ Even if they are shown to be necessary, the defendant may still need to make the practice less intrusive, if there is a way to do so. The effect of the policy or practice on an individual is said to occur “because of” the individual’s protected class status, even though there is no intentional discrimination at play.

But what about scenarios that are significantly less clear? My research agenda exhorts me to engage with and explore these issues constantly, and I believe that there is room for them, even in a traditional employment discrimination survey class. As I explain to my class, the law of Title VII is so relatively new and its jurisprudence so continually (and so slowly) evolving, that learning about and thinking about the next frontiers of discerning and capturing harm that befalls employees “because of” their sex or race or other protected class status, is more than just an exercise in musing. It is a chance to really think about the role that they might actually have in advancing or changing the law once they reach practice. On one hand, Title VII, as courts so frequently intone, is not a “civility code,” whereby every slight is actionable.¹⁶ On the other hand, in a world in which social science and psychology inform societal—and judicial—understandings of things like unconscious bias, one should not be so quick to deem a “because of” allegation as too attenuated.

Thus, my seminar focuses on and my survey courses cover the “periphery of Title VII”—those scenarios, cases, and doctrines that press and challenge the contours of the statute and the domain of that and whom it regulates. We talk about behaviors and issues that traverse the spectrum between that which is clearly covered by Title VII and that which is clearly outside its reach. So, for example, the Supreme Court has held that Title VII is violated when a woman is not selected for a promotion as a result of having been deemed by a decision maker as “too manly” in her appearance and affect to conform to the

Dundee, 682 F.2d 897, 908 (11th Cir. 1982) (“An employer may not require sexual considerations from an employee as a *quid pro quo* for job benefits.”).

15. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); *Int’l Bhd. of Teamsters v. U. S.*, 431 U.S. 324, 335 n.15 (1977) (“[D]isparate impact . . . involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”).

16. See Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 623 (2011) [hereinafter *Stereotyping*] (“Title VII was not designed to be a civility code; Congress certainly did not design it to prevent employers from levying certain legitimate criticisms at certain individuals.”); See e.g., *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

stereotype of a feminine, beautiful, polite, and deferential woman.¹⁷ But does that mean that subsequently, a woman who is not hired because she lacks a “Midwestern girl look” has a viable cause of action?¹⁸ What about a gay man who is harassed for being too effeminate and not conforming to the stereotype of a typical heterosexual male?¹⁹

Indeed, courts have varied in their responses to these and other related questions.²⁰ To take another example, sexual harassment consisting of sexual overtures made toward a victim or of pejorative language directed at a victim that references her sex and is said to be “because of sex” and actionable.²¹ But workplace bullying that is “neutral” and evenly meted out, is wholly lawful,²² as is a certain amount of general vulgarity.²³ What, however, about “gendered

17. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

18. *See Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041–42 (8th Cir. 2010) (finding employer’s criticism of employee for lack of “prettiness” and the “Midwestern girl look” may be evidence of wrongful sex stereotyping).

19. *See Prowel v. Wise Bus. Forms, Inc.* 579 F.3d 285, 292 (3rd Cir. 2009) (“There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not.”); *see generally Stereotyping*, *supra* note 16, at 641–42 (describing court treatment of cases in which “a homosexual plaintiff alleged a failure to comport with the gender stereotypes of a decision-maker.”).

20. *See, e.g., Love v. Motiva Enters.*, No. 07–5970, 2008 WL 4286662, at *9 (E.D. La. Sept. 17, 2008) (rejecting plaintiff’s allegation of gender stereotyping by finding that someone’s idea of a “liberated, physically fit woman by definition cannot constitute a stereotype, which is based on society’s general ideas about traits commonly thought to be shared by persons of the same physical type.”); *Moren v. Progress Energy, Inc.*, No. 8:07-cv-1676-T-17, 2008 WL 3243860, at *5 (M.D. Fla. Aug. 7, 2008) (finding plaintiff’s allegation that he was harassed because of the perception that he was “a particular kind of man” as vague and cryptic and insufficient to show that the alleged harassment was based on plaintiff’s perceived failure to conform to a masculine gender role); *Zhao v. State Univ. of N.Y.*, 472 F. Supp. 2d 289, 309–10 (E.D.N.Y. 2007) (noting that both the Supreme Court and the Second Circuit have held that decisions resulting from “stereotyped” impressions or assumptions about the characteristics or abilities of women violate Title VII; further adding: “These same principles undoubtedly apply with equal force to racial and ethnic stereotyping.”).

21. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 782 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 60 (1986); *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 429 (7th Cir. 2012); *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1260 (10th Cir. 2005); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 30 (1st Cir. 2003); *Gentry v. Export Packaging Co.*, 238 F.3d 842, 845 (7th Cir. 2001); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 874–75 (D. Minn. 1993).

22. *See Kerri L. Stone, Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying*, 23 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2013).

23. *See Faragher*, 524 U.S. at 788 (citations omitted) (“‘Simple teasing’, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”); *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430 (7th

bullying,” whereby the standard for actionable harassment is clearly not met, although a woman is made to feel alienated or diminished in the workplace because of her sex, nonetheless? What about a situation in which a victim is forced to continually observe the harassment of another woman, but is not directly harassed, herself?

By getting my students to think about the outer parameters or contours of Title VII, both (to an extent) in my survey classes and in my seminar, I want to challenge them to craft arguments based on logical extensions of existing law. Since employment discrimination jurisprudence is always trying to outpace the behavior that it regulates, it remains dynamic and continually evolves. In fact, I often point to the dates on recent cases that resolve issues that seem so rudimentary that one would have thought they had been resolved decades earlier. Whether a student wants to press the boundaries of existing law on behalf of plaintiffs or to represent defendant employers and prevent incursions into the law, she must understand how to deploy policy arguments and marshal arguments from existing precedent to argue in either direction with the same facility. Along those lines, I tell my students that it is of no moment to me or to their classmates which way their personal views or ambitions skew; they should leave the class prepared to pursue whatever career they desire and with more than a working knowledge of what goes into representing the other side.

Students will sometimes voice views on a variety of topics that might alienate others in the class, and like other professors, I work and strive to maintain an atmosphere of openness, respect, and civility during class discussions. The delicate balance of all that goes into doing this could be the topic of its own paper, but this paper is about teaching the “periphery of Title VII,” (and other employment discrimination statutes), how to navigate their ever-changing boundaries and having students at least understand the arguments on both sides of the attendant debates, when you are teaching a generation of law students that contains many members who seem to believe that the law—and the society that it seeks to regulate—is “post-sex.”²⁴

Cir. 1995) (“The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . . It is not designed to purge the workplace of vulgarity.”).

24. See Sarah E. Whitney, *I Can Be Whoever I Want to Be: Alias and The Post-Feminist Rhetoric of Choice*, GENDERS.ORG, 5, http://www.genders.org/g57/g57_whitney.html (last visited Aug. 13, 2013) (“[P]ost-feminism is a popularly understood discourse, growing in voice since the 1980s, which believes that gender equity has been fully achieved, and consequently that feminist activism is neither necessary nor desired.”); Elaine J. Hall & Marnie Salupo Rodriguez, *The Myth of Postfeminism*, 17 GENDER & SOC’Y 878, 880 (2003) (“By uncritically declaring that gender equality exists in the 1990s, the backlash casts the women’s movement as irrelevant. . . . [T]he backlash fosters the development of antifeminist attitudes.”); Stephanie Sipe, C. Douglas Johnson & Donna K. Fisher, *University Students’ Perceptions of Gender Discrimination in the*

III. THE POST-SEX GENERATION

It appears that the term “post-racial” became increasingly common about six years ago with the candidacy and subsequent election of President Barack Obama.²⁵ Such a term can mean, as posited by author Ralph Eubanks, “race is no longer an issue or an impediment to progress in American society,” or to indicate “a color-blind society where race is not an issue. We are all Americans, and we’re just completely color blind.”²⁶ The term, according to Duke University professor Mark Anthony Neal, is often used to mean that conversations about race have been obviated by integration and the affording of racial equality in society.²⁷ In other words, the message conveyed is that the impediments to equality have all but been removed, and that society has grown fatigued of the conversation.²⁸

Although there has been considerable backlash in response to this attitude, with movements like the “After Race Project,” whose goal is to “rebut the notion that we have arrived at the promised land where, as a society, we have finally moved beyond race,” taking hold and gaining momentum.²⁹ Those who subscribe to these movements term post-racialism as noxious and nefarious,

Workplace: Reality Versus Fiction, 84.6 J. EDUC. & BUS. 339, 339 (2009) (finding that students believe they are entering a gender-neutral workplace).

25. See, e.g., Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1224–25 (2011) (stating that “[t]he race between Barack Obama and Hillary Clinton for the 2008 Democratic nomination for president caused many to ask whether the United States has moved beyond equality”); Tyrone Forman, *Beyond Prejudice? Young Whites’ Racial Attitudes in Post Civil Rights America, 1976-2000* (2010), http://userwww.service.emory.edu/~tforman/working/Forman_Beyond_Prejudice_Web.pdf (“In fact, a cursory review of news articles might lead one to conclude that young Whites have moved completely beyond the prejudicial attitudes espoused by their parents and grandparents to become truly colorblind.”); Abigail Thernstrom & Stephan Thernstrom, *Taking Race out of the Race*, L.A. TIMES (Mar. 2, 2008), <http://articles.latimes.com/2008/mar/02/opinion/op-thernstrom2> (“Today, it is even clearer that race has become less of a factor in voting. The high level of white votes for Obama strongly suggests that other black candidates facing overwhelmingly white constituencies can do well.”); Donna Brazile, *Obama a Marker on Post-Racial Path*, CNN (Feb. 21, 2013), <http://www.cnn.com/2013/02/21/opinion/brazile-black-history-crossroads>; Shelby Steele, *Obama’s Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008), <http://www.latimes.com/news/opinion/opinionla/la-oe-steele5-2008nov05,0,6049031.story>; *Under Obama, Is America ‘Post Racial?’*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/roomfordebate/2011/09/21/under-obama-is-america-post-racial>; Marc Fisher, *With Obama, Not a Post-Racial Nation, but Something More Complex*, THE WASHINGTON POST (Jan. 21, 2013), http://articles.washingtonpost.com/2013-01-21/national/36473165_1_barack-obama-white-house-first-black-president.

26. *The ‘Post Racial’ Conversation, One Year In*, NPR (Jan. 18, 2010, 1:00 PM), <http://www.npr.org/templates/story/story.php?storyId=122701272>.

27. See *id.*

28. See *id.*

29. Robert S. Chang, *What Comes After Gender?*, 31 PACE L. REV. 818, 819 (2011).

“build[ing] on colorblindness in order to manage diversity to maintain the racial status quo.”³⁰

The term “post-sex,” or “post-feminism,” and its discourse, then, like the idea of post-racialism, has been characterized as somewhat ineffable, much like feminism, itself, “a discourse that, like the proverbial baby elephant, is difficult to describe, but you know it when you see it.”³¹ Moreover, this sentiment has become as pervasive as it is hard to articulate, with teachers in the United Kingdom reporting that a good deal of the students that they see, “male and female, seem reluctant to accept that gender inequality exists. This is partly due to students not yet having experienced discrimination in the workplace and also the result of a discourse often referred to as ‘post feminism.’”³² While the aspiration of a world in which “sex category matters not at all beyond reproduction; [and] economic and familial roles would be equally available to persons of any gender,” have been lauded, it has, by almost all accounts, not been achieved.³³ That notwithstanding, I have witnessed, in my classes, the rise of an insistence that sex category does not matter and a belief that attempts to look at context to ascertain whether something that appears neutral might have a sex-based effect or undergirding are almost categorically inappropriate.

IV. ANN HOPKINS AND THE POST-SEX GENERATION

One interesting topic in the employment discrimination curriculum that navigates the parameters of Title VII is that of stereotyping. The law is so unclear on when and how, precisely stereotyping constitutes evidence of unlawful discrimination that many scholars, myself included, have written on the subject. The seminal case on sex stereotyping as unlawful discrimination is

30. *Id.*

31. Susan Durbin & Steve Fleetwood, *Gender Inequality in Employment: Editors' Introduction*, 29 *EQUAL., DIVERSITY, & INCLUSION: AN INT'L J.* 221, 221–22 (2010).

32. *Id.* at 221; see also Onwuachi-Willig, *supra* note 1, at 760 (“As with any matter, teaching about workplace discrimination can be difficult when much of the audience has not held a ‘real’ job.”).

33. SHELLEY PACHOLOK, *INTO THE FIRE: DISASTER AND THE REMAKING OF GENDER* 102 (2013) (citing Candace West & Don H. Zimmerman, *Accounting for Doing Gender*, 23 *GENDER & SOC'Y* 112, 117–18 (2009); see also Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 *MICH. L. REV.* 2541, 2542 (1994) (“Despite the progress made under Title VII in eliminating barriers to women’s access to equal employment opportunities, the Act has never kept up with the expectations many have had for it. At any given time, there seems to be a significant gap between what the law finds unacceptable under Title VII and what scholars and advocates contend the Act should prohibit. A gap between a law’s reach and the aspirations of those who seek to use it to accomplish substantial societal reform is a common enough phenomenon, but this is small consolation, and critics look for explanations.”).

Price Waterhouse v. Hopkins.³⁴ In that case, the plaintiff proffered evidence and expert testimony to establish that her allegedly discriminatory non-selection was influenced by, if not born of impermissible sex stereotyping—the expressed sentiment that she was too masculine in her appearance and affect for the position at issue.³⁵ Specifically, the Court explained, “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”³⁶

The Supreme Court, however, provided virtually no guidance regarding precisely what a legal doctrine known as “stereotyping” would look like in detail. Essentially, the Court said that the case it was examining was resolved easily enough without its needing to limit the “possible ways of proving that stereotyping played a motivating role in an employment decision.”³⁷ Moreover, the Court expressly declined to “decid[e] here which specific facts, ‘standing alone,’ would or would not establish a plaintiff’s case.”³⁸ Declining to give the lower courts much more aid than that in ascertaining when or how employers’ stereotyping would engender a Title VII violation, the Court seemed to take a “we’ll-know-it-when-we-see-it” approach to sex stereotyping:

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor . . . does it require expertise in psychology to know that, if an employee’s flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.³⁹

When I teach *Hopkins* in my survey or seminar classes, I make mention of the lower courts’ disagreement and inconsistencies as to its proper application when a member of a protected class alleges that she was not seen as conforming with a desired stereotype for that class. I provide examples of cases in which courts have been receptive to arguments crafted around the *Hopkins* premise, like that with the male plaintiff who, in the course of being fired for an ostensibly legitimate reason (complaints of sexual harassment), was told that because he was a man, he probably did what he was accused of in any event, and no one would believe him,⁴⁰ and that with the female plaintiff

34. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

35. *Id.* at 235–36 (“Dr. Susan Fiske, . . . testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping.”).

36. *Id.* at 250.

37. *Id.* at 251–52.

38. *Id.* at 252.

39. *Hopkins*, 490 U.S. at 256.

40. *Sassaman v. Gamache*, 566 F.3d 307, 311 (2nd Cir. 2009). See *Stereotyping*, *supra* note 16, at 623 (referencing the tautology of “you’re a man; you probably did it anyway”).

who alleged that she was terminated because she did not have “that Midwestern girl look.”⁴¹ I also tell them about those plaintiffs who met with judicial resistance to their proffering of stereotype evidence and their invocation of *Hopkins*, like the male plaintiff who, in the course of being fired from his job as a substitute teacher for an ostensibly legitimate reason (his borderline inappropriate interactions with female students), was told that he was “too macho.”⁴² These cases force the students to do several things. In the course of attempting to reconcile them and either discern a cohesive rule or articulate what such a rule would ideally say, the students must think critically about the purpose of Title VII, when and how stereotyping should incur or bespeak liability, and the comportment of various arguments with what the Court attempted to do in *Hopkins*.

In class, I like to devote time to a discussion of how to reconcile courts’ disparate takes on this issue and of how we might forecast future trends in this area. I also like to point out how even within the adjudication of a single case, reasonable federal judges persistently disagree as to how and when a stereotyping argument is cognizable, both when they are on the same court (when a judge on an appeals panel dissents, for example), or different ones (when a district court is overruled, or when a judge examines, but then rejects authority from another jurisdiction). I also like to observe that looking at cases in which men, who are not a traditionally marginalized or disadvantaged protected class, bring stereotyping claims, but experience different outcomes, the students can, perhaps, examine the merits and drawbacks to recognizing *Hopkins*/stereotyping arguments as cognizable. I also try to incorporate current legal news by finding cases that have been recently filed or are pending, and because many, if not most of my students have had work experience, I invite them to ask questions or illustrate points informed by their own experiences, if they are comfortable doing so.

One year, a female student disclosed to the class “that she had been told by her boss at work that she was ‘too girly’ to succeed at the company.”⁴³ She quickly added the boss had “‘no problem with women,’ though, and he had readily hired and promoted numerous other women.”⁴⁴ I then questioned my class: “if this woman were to suffer an adverse action at the hands of this boss,” could she make out a case of unlawful discrimination by using this evidence?⁴⁵ Although I was hoping to generate a robust debate, I was assuming

41. *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1036 (8th Cir. 2010).

42. *Lautermilch v. Findlay City Schs.*, 314 F.3d 271, 274 (6th Cir. 2003).

43. Colin Miller, *Article of Interest: Kerri L. Stone’s Clarifying Stereotype*, FEMINIST LAW PROFESSORS (Apr. 27, 2011), <http://www.feministlawprofessors.com/2011/04/article-of-interest-kerri-l-stones-clarifying-stereotype/>.

44. *Id.*

45. *Id.*

that at least some students would say that she could. This was not the case. One (male) student contended, "Employment is at will. If this guy really has a good record with women and he has singled her out because of the way in which she comes across to him, that's his prerogative."⁴⁶ Another student countered, "What about *Hopkins*? Isn't that gender stereotyping?"⁴⁷ Another (female) student weighed in: "If this woman were held back while many other women were not, how could the issue be tied to her sex and not to particularities of her personality?"⁴⁸ Others agreed: "It's about her being girly. Not the fact that she's a woman at all." One after the other, they responded that "employment is at will," and that "he clearly doesn't have a problem with her sex." "It's an interpersonal problem," they said; "he has every prerogative to dislike the way in which she acts and to tell her."

I spent the next 35 minutes trying, in vain, to get them to at least see that the word "girly," rather than being purely descriptive, as they saw it, was, at the very least "gendered," and could raise flags with respect to any discrimination analysis, irrespective of which way it came out.⁴⁹

I was struck by how vehemently my students, especially the females in the class, wanted to press the issue and assert the right of an employer to exclude from its workplace those who possess certain characteristics, without thinking about how and when (or if) this might offend the law or traditional notions of fairness and equality. To the extent that the word "girly" bespoke characteristics separate and apart from the sex of the employee, the students' point seems like it should be well-taken. Immature, shrill, meek, or vacuous employees of either sex or of any background typically don't fare well in most jobs. But what of those who only see a word like "girly" as a descriptive word, wholly divorceable from its inherently gendered nature?

We talked a bit about theory, feminist theory, and the so-called "waves" of feminism that has had subscribers alternately advancing women's interests through the theoretical approach of formal equality, through a vehicle that touted the differences between the sexes, by focusing on the imbalance of power vis-à-vis men and women, and, in the "third wave" by embracing women's sexuality and "girlie culture," as well as "embracing individual experiences and making personal stories political."⁵⁰ I exhorted them to think

46. *Id.*

47. *Id.*

48. Miller, *supra* note 43.

49. See Cheryl B. Preston, *Subordinated Stills: An Empirical Study of Sexist Print Advertising and Its Implications for Law*, 15 TEX. J. WOMEN & L. 229, 257 (2006) ("Being envisioned as 'girls' and 'girlie' may be fashionable in some circles, but notwithstanding this effort to reclaim and empower these terms, they retain overwhelmingly negative connotations and usages.").

50. Kathy A. Thomack, *Centering Men's Experience: Norah Vincent's Self-Made Man Complicates Feminist Legal Theorists' Views of Gender*, 15 BUFF. WOMEN'S L.J. 1, 28 (2006).

about how, irrespective of whether they believed any, all or none of these theories or their underlying goals to be viable, the word “girly,” as used by a critical supervisor, might bear upon sex in some way. I encouraged them to think about how using slurs reserved for women or relating to women’s anatomy when talking to or describing men actually bespeaks sexism and misogyny.⁵¹

The (near entire) class persisted in decrying a view of the word “girly” that evinced any sort of sexism or bias. That’s when, I decided to try a different approach. “Okay. Let’s change the example here. What if a firm had a spectacular record of hiring and promoting members of a certain minority racial group—let’s say Asian Americans, and let’s say in numbers greater than the group exists in the labor pool. But one day, one guy is pulled aside and told that he’s ‘too ethnic’ seeming to succeed at the company. Title VII problem?”⁵²

I paused, and watched most of the students look visibly uncomfortable.⁵³ “Good, I exclaimed. You’re bristling. You’re uncomfortable.” “Well,” replied one student, “that’s a really offensive thing for a boss or a supervisor to say.”⁵⁴ “Okay,” I answered, “but anchor your analysis to Title VII. Offensive doesn’t mean actionable, and well-intentioned doesn’t mean lawful; you know that.”⁵⁵ He struggled.

It took a while, but slowly, the students found their way back to Title VII. We circled back to a discussion of stereotyping, the *Hopkins* case, and what it meant to be the “wrong type” of protected class member (woman, minority, etc.).⁵⁶ With some prompting, one student recalled a case that we had studied weeks prior, *Connecticut v. Teal*, and how the Supreme Court in that case had

51. See Colleen M. Keating, *Extending Title VII Protection to Non-Gender-Conforming Men*, 4 MOD. AM. 82, 84 (2008) (describing “a 2004 incident in which California governor, Arnold Schwarzenegger, criticized his political opponents by calling them ‘girly men.’ . . . [H]e was accusing them of being weak or ineffective. . . . [This] statement implies that the only people who belong in positions of power are ‘real’ men, who are physically strong, macho, and aggressive. The underlying assumption is that women—and men who are too much like women—cannot perform effective work. . . . [T]his ‘disfavoring of characteristics gendered feminine may work to the systematic detriment of women and thus should be analyzed as a form of sex discrimination.’”); Toni Calasanti, Kathleen F. Slevin & Neal King, *Ageism and Feminism: From “Et Cetera” to Center*, 18 NAT’L WOMEN’S STUD. ASS’N 13, 15 (2006) (“[T]erms related to girls and women, such as ‘sissy’ and ‘girly,’ are used to put men and boys down and reinforce women’s inferiority.”).

52. Miller, *supra* note 43.

53. *Id.*

54. *Id.*

55. *Id.*

56. See *Stereotyping*, *supra* note 16, at 624 (discussing *Hopkins* as being “the wrong type of woman”).

rejected the so-called “bottom line” defense.⁵⁷ This meant that as per the Court, “It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant’s race are already proportionately represented in the work force,” and that “Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”⁵⁸

Although decided in the context of a disparate impact case, *Teal* was instructive in our discussion, in that it reinforced the point that it is incongruous with Title VII’s objectives and workings to construe the discriminatory treatment of an individual somehow negated or neutralized by the retention and advancement of other members of that individual’s protected class. The class remained divided, however, as to what, precisely, is conveyed by the use of a word like “girly.” We did proceed to discuss what might be drawn from the very fact that the word and other gendered words’ usage in society was so entrenched and pervasive as to have become synonymous with neutral (or at least less gendered) words and severable from the context of sex or gender.

V. SIGN OF THE TIMES?

Over the past few years, I have seen much more evidence of the view that we are, somehow, “past feminism,” and that laws that regulate the entrance of sex bias (especially in subtle ways) into decision making are simply unnecessary and intrusive. Again, there is nothing wrong with continually questioning the necessity for or relevance of the current level of vigilance required by the law and thoughtfully debating its retraction. There is certainly nothing wrong with concluding, especially in a close case that hovers on the periphery of Title VII’s domain, that the goals of the law are best served by having it not apply. But what I have seen in class are tenacious refusals to entertain the notion that certain behavior or speech alleged to be neutral could even conceivably be gendered.

So, for example, in more recent years when I introduce the topic of “gendered bullying”⁵⁹ that is either focused on women or is tinged with gendered, alienating, or sexual references, I have been met with the reaction that women need to simply “toughen up.” A concrete example of where this has come up is when I teach the case of *Reeves v. C.H. Robinson Worldwide*,

57. *Connecticut v. Teal*, 457 U.S. 440, 442 (1982).

58. *Id.* at 454–55.

59. Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. ANN. SURV. AM. L. 35, 59 (2009).

Inc., a case in which an en banc court held that, contrary to the holding of the lower court and much of conventional belief on the subject, actionable sexual harassment can occur where the victim is not targeted and in which simple, alleged “gender neutral” vulgarity engenders the harassing environment.⁶⁰ In that case, the plaintiff had to deal with “gender-derogatory language addressed specifically to women as a group in the workplace. Her co-workers used such language to refer to or to insult individual females with whom they spoke on the phone or who worked in a separate area of the branch.”⁶¹ Moreover, the plaintiff was forced to hear played in her workspace on a daily basis “a crude morning show” on the office radio.⁶² This show “featured . . . regular discussions of women’s anatomy, a graphic discussion of how women’s nipples harden in the cold, and conversations about the size of women’s breasts.”⁶³ She was also subjected to, among other things, crude and pornographic images displayed on co-workers’ computer screens, though she was never personally singled out for targeted sex-based abuse, she was forced to observe her only female co-worker be so targeted and attacked.⁶⁴ When her complaints fell on deaf ears, and the behavior did not cease, she eventually resigned and sued.⁶⁵

The district court found that summary judgment against her was appropriate⁶⁶ for what were largely the same reasons my class did: the speech was not directed towards the plaintiff, specifically; and because the crude behavior occurred before all employees, both men and women were afforded equal treatment. Thus, the plaintiff was never “intentionally singled out for adverse treatment because of her sex,” and the behavior and creation of the environment were not actionable.⁶⁷ My students, upon reading the facts of the case, were similarly persuaded that this was not a case of intentional, sex-based harassment, but rather one of general, commonplace crudeness and that rather than push what they saw as the boundaries of Title VII, this and other similar would-be plaintiffs needed to toughen up or find a workplace that they would find more palatable.

60. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 813–14 (11th Cir. 2010) (en banc).

61. *Id.* at 804. For example, “[h]er co-workers, she claimed, regularly used curse words such as ‘fuck,’ ‘fucker,’ and ‘asshole.’ *Id.* at 804. They used the intensely offensive epithet ‘Jesus fucking Christ,’ and the terms ‘fucking asshole,’ ‘fucking jerk,’ and ‘fucking idiot.’ *Id.* They also discussed sexual topics such as masturbation and bestiality. *Id.*

62. *Id.* at 804.

63. *Id.*

64. *Id.*

65. *Reeves*, 594 F.3d at 806.

66. *Id.*

67. *Id.*

Indeed, the U.S. Court of Appeals for the Eleventh Circuit in *Reeves* acknowledged that “Title VII is not a civility code,” and the “bedrock principle” that “not all profane or sexual language or conduct will constitute discrimination in the terms and conditions of employment.”⁶⁸ However, the court held that while:

[e]ven gender-specific terms cannot give rise to a cognizable Title VII claim if used in a context that plainly has no reference to gender, . . . when a co-worker calls a female employee a bitch, the word is gender-derogatory. . . . [T]he terms “bitch” and “slut” are “more degrading to women than to men.”⁶⁹

The court thus concluded that “[c]alling a female colleague a ‘bitch’ is firmly rooted in gender. It is humiliating and degrading based on sex.”⁷⁰

Moreover, the court held that a plaintiff can maintain a viable hostile work environment claim in certain circumstances, despite the fact that she was not, herself, the direct target of the harassing behavior.⁷¹ According to the court:

It is enough to hear co-workers on a daily basis refer to female colleagues as “bitches,” “whores” and “cunts,” to understand that they view women negatively, and in a humiliating or degrading way. The harasser need not close the circle with reference to the plaintiff specifically: “and you are a ‘bitch,’ too.”⁷²

The court noted that even general vulgarity can operate to discriminate against women because it subjects them uniquely to “disadvantageous terms or conditions of employment,” in contravention of Title VII.⁷³ As the court noted:

[A] substantial portion of the words and conduct alleged in this case may reasonably be read as gender-specific, derogatory, and humiliating. . . . A jury . . . could find on this record that . . . conduct in the office contributed to conditions that were humiliating and degrading to women on account of their gender. . . . Like “bitch,” “whore” is traditionally used to refer only to women. . . . The social context . . . allows for the inference . . . that the abuse did not amount to simple teasing, offhand comments, or isolated incidents, but rather constituted repeated and intentional discrimination directed at women as a group. . . . It is not fatal to her claim that Reeves’s co-workers never directly called her a “bitch,” a “fucking whore,” or a “cunt.”⁷⁴

Further, the court went so far as to reject the notion that using gendered terms to address and describe people of both sexes, rather than being “neutral”

68. *Id.* at 807.

69. *Id.* at 810.

70. *Reeves*, 594 F.3d at 810.

71. *Id.* at 811.

72. *Id.*

73. *Id.*

74. *Id.* at 811–12.

and nondiscriminatory, is very much discriminatory “because of sex.”⁷⁵ “Calling a man a ‘bitch’ belittles him precisely because it belittles women. . . . Indeed, it insults the man by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well.”⁷⁶

This case certainly took behavior that might be seen as hovering on the periphery of Title VII and extended its application past where many believed it should go because it perceived that that application would best serve the broad remedial goals of the statute. I have found many students’ reactions to this case’s outcome to be overwhelmingly negative, with many, including women in the class, voicing the view that women need to “toughen up” and rejecting the view that women, as a class, would be uniquely affected by such behavior. Interestingly, some of the most vocal students on this point in the recent past have been women, and many have shared personal stories about the types of work environments that they have experienced, and how they either acclimated and “toughed it out,” even if it pained them, or decided to move on, an option, they noted, that is available to anyone.

I have had to be extremely mindful when trying to generate discussion among such students, who have often been lifelong achievers, both shielded and promoted by the artifice and virtual meritocracy that is school. Students, irrespective of their politics or ambitions, need an understanding of the context in which antidiscrimination laws have been passed and operated and with a grasp of the notion that the whole point of these laws is precisely to make it such that those who are adversely affected because of their protected class status, like their sex, are not issued an ultimatum that they either accept the disparate treatment or the disparate impact conferred in the workplace or “move along.” Once they have these things, if they determine that they disagree with a particular application or expansion of a law or doctrine, this informed opinion contributes to the richness and diversity of viewpoint that a good discussion or debate should have.

However, without a proper understanding of context—the history of discrimination, its evolution, manifestations, and impact, as well as the legislation passed to regulate and prohibit it—students can lapse into blind recitations of personal narratives and pat answers like “deal with it,” that speak to their personal frustrations with others’ difficulties with workplace speech and culture.⁷⁷ These reactions might occur without consideration of whether the structural and societal forces—the status quo—that engender the speech

75. See *Reeves*, 594 F.3d at 813.

76. *Id.*

77. See Onwuachi-Willig, *supra* note 1, at 758 (“Analyzing employment discrimination law within the historical context in which Title VII and many other civil rights statutes arose is necessary to understanding not only the basis of the area’s burden-shifting frameworks but also their application to factual situations.”).

and culture are inherently problematic and in need of reform. Once this consideration has occurred, a rejection of this possibility, from my point of view as an educator, is fine. But it is my goal to guide the discussion, challenge assumptions, and cultivate empathy for those in the shoes of litigants—on both sides of the aisle—and to provide insight into the policy considerations that inform their views.

Thus, I try to play “devil’s advocate” as often as possible, asking a student, for example, who has advocated for a widespread expansion of Title VII’s application, whether we wouldn’t, in fact, be in danger of creating a civility code out of the statute if we did so, and allowing courts to deprive employers of deference to which they are entitled and to sit as the “super personnel” departments that the Supreme Court has admonished them to avoid becoming. My goal is to arm them to work on either side of a case with clarity and insight into how the other side will proceed and the arguments that it will make. When preparing students to represent or to better understand defendants in employment cases, I ensure that we discuss things like employer prerogative and managerial discretion and the right of an employer to ensure the smooth and efficient running of its workplace and operations. We discuss how to build arguments to favor employer-sided policies and outcomes in and under the law. I attempt to do the same when it comes to articulating the views and arguments of plaintiffs when it comes to jurisprudence and individual outcomes. But when met with the overwhelming view from a class that even behavior like that in *Reeves*, found to be actionable by a court of appeals, is something that needs to be “dealt with” and “gotten over,” I need to challenge assumptions from the other end of the spectrum.

I have, then, raised issues in class like the history of discrimination and harassment and the impact that they have had on women’s achievement of power, status, and compensation in the workplace. I have used statistics to illustrate the stark disparity between men and women when it comes to presence and power in the highest echelons of employment.⁷⁸ We have also

78. See Stone, *supra* note 1, at 1980 (“[T]he gap between the proportion of females to males enrolled in college has only grown since 1991, with women comprising the majority (56 percent) of college students (estimated to number about 11.3 million female students). . . . [W]hile the chasm between the employment rates of young male and female workers has indeed become smaller . . . men have continued to hold a larger percentage of the workforce than females across all levels of education. . . . Focusing specifically on the professional workplace . . . the highest level concentrations of power, compensation, recognition, and longevity in the professional workplace—the disparity between those who have traditionally occupied the highest levels, men, and those who have not, women, remains as glaring as ever.”); Richard Pérez-Peña, *U.S. Bachelor Degree Rate Passes Milestone*, N.Y. TIMES (Feb. 23, 2012), <http://www.nytimes.com/2012/02/24/education/census-finds-bachelors-degrees-at-record-level.html> (“For many years, colleges have enrolled and graduated more women than men, and a historic male advantage in higher education has nearly been erased. In 2001, men held a 3.9 percentage-point lead in

discussed more practical issues, like how difficult it may be in a bad economy to “move on” and get another, comparable job, in the face of behavior, actionable or not, that impacts an employee uniquely because of sex (or race, etc.), and we have questioned why someone, in light of the legislation and its goals, should have to. It has been interesting, in that vein, to challenge the assumption that “because I (or others) dealt with sexist or racist behavior, you should be able to also,” and to discuss (with our very diverse student body) the dynamics and mechanics of intra-protected-class relations and to discuss same race and same-sex discrimination.

Questions about how the perpetuation of the status quo by the very people that have been forced to endure it and the effects of that cycle are invariably introduced, by both the students and me, and students are forced to engage with the attitudes, beliefs, and insights that underlie their own initial “gut” reactions. I have, more recently, thought about inviting in guest speakers who are newly minted lawyers so that students can hear from others in their field and not much further along than they, themselves, are, the difference between the idea that someone *should* be able to endure certain treatment or survive a certain culture and the realities of having to do so. Finally, the realities of the legal job market come up periodically in class as we discuss practice, opportunities, and carving out a professional niche for oneself within the subject matter. It is thus relatively easy to challenge the notion of perfect portability contemplated by the “if she doesn’t like the treatment, why doesn’t she just leave” comments.

CONCLUSION

In the end, it is not the students’ ultimate views on any particular application, doctrine, statute or holding that matters, but their exposure to the strategies, arguments, insights, and considerations of those with whom they disagree that will make them better attorneys, capable of forming informed opinions that they can successfully defend. I look forward to continuing to challenge my students’ beliefs and getting them to be able to recite and defend the arguments that will likely be coming at them from the other side of whichever side of the aisle they choose. I also look forward to seeing how societal beliefs evolve on the topic of sex equality and civil rights, and how those beliefs show up in my classroom.

bachelor’s degrees and 2.6 percentage points in graduate degrees; by last year, both gaps were down to 0.7 percent.”); *see also Highlight of Women’s Earnings in 2011*, U.S. DEP’T OF LAB., BUREAU OF LAB. STAT., (Oct. 2012), *available at* <http://www.bls.gov/cps/cpswom2011.pdf> (“In 2011, women who were full-time wage and salary workers had median usual weekly earnings of \$684, about 82 percent of median earnings for male full-time wage and salary workers (\$832).”).

NOTE

